

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID FOLEY,)	No. CV-08-3068-JPH
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS'
)	MOTIONS FOR SUMMARY JUDGMENT
v.)	AND STRIKING STATUS
)	CONFERENCE
)	
Klickitat County, and City of)	
Goldendale,)	
)	
Defendants.)	

On December 21, 2009, the Court heard oral argument on defendants' motion for summary judgment (Ct. Recs. 38, 49) set for oral argument at defendants' request. (Ct. Recs. 45, 59, 60.) Lonnie Davis, attorney for plaintiff, did not appear at the hearing in person or telephonically. Patrick Moberg appeared telephonically on behalf of defendant Klickitat County. Michael Bolasina appeared in person on behalf of defendant City of Goldendale. The parties consented to have the matter decided by a Magistrate Judge. (Ct. Rec. 10.)

Plaintiff is an incomplete paraplegic and uses a wheelchair. (Ct. Rec. 50 at 2, 62 at 2.) He alleges he was discriminated against because of his disability when he was incarcerated in the

1 Klickitat County Jail from October 23, 2005,¹ through October 25,
2 2005 (Ct. Rec. 1 at ¶ 5). He alleges his rights under Title II of
3 the Americans with Disabilities Act (ADA)², the 1973
4 Rehabilitation Act³, and RCW 49.60⁴ were violated when Mr. Foley
5 was jailed following arrest for animal cruelty, obstructing a
6 public servant, and carrying a firearm in a prohibited place. (Ct.
7 Recs. 39 at 1, 50 at 3-4.)

8 Background

9 [Except as noted, the facts are taken from Ct. Rec. 50.] The
10 events giving rise to this action took place on October 23, 2005,
11 after Mr. Foley was booked into the Klickitat County Jail just
12 after two a.m. (Ct. Rec. 50 at 4.)

13 Plaintiff alleges at the jail he was handcuffed, dumped or
14 pushed from his wheelchair onto the floor of the cell, taunted,
15 embarrassed and denied access to adequate bedding, medication, a
16 toilet, and medical toileting equipment. He alleges he was forced
17 to soil himself as a result of the treatment he received. (Ct.
18 Rec. 1 at 3-4; Ct. Rec. 40 at 10.)

19 Defendants allege there are no facts supporting any of
20 plaintiff's claims. (Ct. Rec. 39 at 2-3 - City of Goldendale;
21 Ct. Rec. 51 at 1 - Klickitat County.)

22 Procedurally, the City moved for summary judgment on
23

24 ¹Plaintiff was placed in a holding cell at 2:38 a.m. on
25 October 23, 2005, and released at 5:28 p.m. on Tuesday, October
26 25, 2005. (Ct. Rec. 50 at 4.)

27 ²42 U.S.C. § 12132.

28 ³29 U.S.C. § 794.

⁴RCW 49.60, Washington's Law Against Discrimination.
ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT - 2

1 September 22, 2009; the County, on October 5, 2009 (Ct. Rec. 49).
2 The Court ordered plaintiff to respond to all pending dispositive
3 motions by November 24, 2009. (Ct. Rec. 47 at 2.) As the City
4 correctly observes, plaintiff did not file an opposing brief;
5 instead, on December 7, 2009, he filed two untimely declarations.
6 (Ct. Rec. 64 at 2, referring to Ct. Recs. 66 and 67.) Defendants
7 jointly moved to strike the declarations as timely, asserting they
8 were prejudiced by plaintiff's late filing because they did not
9 have plaintiff's response to review before they were required to
10 file their replies. (Ct. Rec. 68, 74.)

11 The Court granted defendants' motion to strike because
12 plaintiff violated local motion rule LR 7.1 and summary judgment
13 rule 56.1(b). (Ct. Rec. 75.) LR 7.1(e) provides that a failure
14 to timely file a memorandum of points and authorities in support
15 of or in opposition to any motion may be considered by the Court
16 as consent on the part of the party failing to file such
17 memorandum to the entry of an order adverse to the party in
18 default. Fed. R. Civ. P. 56.1(b) required plaintiff to set forth
19 the specific facts which he asserts establish a genuine issue of
20 material fact precluding summary judgment. Because plaintiff
21 failed to do so, the Court is allowed pursuant to LR 56.1(d) to
22 assume the facts as claimed by defendants are admitted to exist.
23 (Ct. Rec. 75). The Court deems all uncontroverted and/or
24 improperly controverted facts alleged by defendants as admitted.
25 (Id.)

26 II. Claims

27 As noted, on September 22, 2009, defendant City of Goldendale
28 (City) moved for summary judgment seeking dismissal of all claims

1 with prejudice (Ct. Rec. 38). On October 5, 2009, defendant
2 Klickitat County (County) filed a motion for summary judgment
3 seeking the same relief (Ct. Rec. 49). Plaintiff alleges his
4 rights protected by the ADA, the 1973 Rehabilitation Act (RA), and
5 Washington's anti-discrimination law (WLAD) were violated by the
6 conditions of his incarceration in October of 2005.

7 III. Legal Standard

8 Summary judgment is appropriate when it is demonstrated that
9 there exists no genuine issue as to any material fact, and that
10 the moving party is entitled to judgment as a matter of law. Fed.
11 R. Civ. P. 56(c). Under summary judgment practice, the moving
12 party

13 [A]lways bears the initial responsibility of informing
14 the district court of the basis for its motion, and
15 identifying those portions of "the pleadings, depositions,
16 answers to interrogatories, and admissions on file,
together with the affidavits, if any," which it believes
demonstrate the absence of a genuine issue of material
fact.

17 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[W]here the
18 nonmoving party will bear the burden of proof at trial on a
19 dispositive issue, a summary judgment motion may properly be made
20 in reliance solely on the 'pleadings, depositions, answers to
21 interrogatories, and admissions on file.'" *Id.* Indeed, summary
22 judgment should be entered, after adequate time for discovery and
23 upon motion, against a party who fails to make a showing
24 sufficient to establish the existence of an element essential to
25 that party's case, and on which that party will bear the burden of
26 proof at trial. *Celotex Corp.*, 477 U.S. at 322. "[A] complete
27 failure of proof concerning an essential element of the nonmoving
28 party's case necessarily renders all other facts immaterial." *Id.*

1 In such a circumstance, summary judgment should be granted, "so
2 long as whatever is before the district court demonstrates that
3 the standard for entry of summary judgment, as set forth in Rule
4 56(c), is satisfied." *Id.* at 323.

5 If the moving party meets its initial responsibility, the
6 burden then shifts to the opposing party to establish that a
7 genuine issue as to any material fact actually does exist.
8 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
9 586 (1986). In attempting to establish the existence of this
10 factual dispute, the opposing party may not rely upon the denials
11 of its pleadings, but is required to tender evidence of specific
12 facts in the form of affidavits, and/or admissible discovery
13 material, in support of its contention that the dispute exists.
14 Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11. The
15 opposing party must demonstrate that the fact in contention is
16 material, i.e., a fact that might affect the outcome of the suit
17 under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
18 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec.*
19 *Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the
20 dispute is genuine, i.e., the evidence is such that a reasonable
21 jury could return a verdict for the nonmoving party, *Wool v.*
22 *Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

23 In the endeavor to establish the existence of a factual
24 dispute, the opposing party need not establish a material issue of
25 fact conclusively in its favor. It is sufficient that "the
26 claimed factual dispute be shown to require a jury or judge to
27 resolve the parties' differing versions of the truth at trial."
28 *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary

1 judgment is to 'pierce the pleadings and to assess the proof in
2 order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)
3 advisory committee's note on 1963 amendments).

4
5 In resolving the summary judgment motion, the court examines
6 the pleadings, depositions, answers to interrogatories, and
7 admissions on file, together with the affidavits, if any. Fed. R.
8 Civ. P. 56(c). The evidence of the opposing party is to be
9 believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences
10 that may be drawn from the facts placed before the court must be
11 drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587
12 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)
13 (per curiam). Nevertheless, inferences are not drawn out of the
14 air, and it is the opposing party's obligation to produce a
15 factual predicate from which the inference may be drawn. *Richards*
16 *v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.
17 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

18 Finally, to demonstrate a genuine issue, the opposing party
19 "must do more than simply show that there is some metaphysical
20 doubt as to the material facts. Where the record taken as a whole
21 could not lead a rational trier of fact to find for the nonmoving
22 party, there is no 'genuine issue for trial.'" *Matsushita*, 475
23 U.S. at 587 (citation omitted).

24 IV. Discussion

25 Plaintiff alleges he was harmed when his rights protected by
26 federal and state law were violated due to his handicap during his
27 incarceration.

28 A. ADA claim

1 Plaintiff alleges two police officers from the city of
2 Goldendale arrested him, handcuffed him, and "then pushed
3 Plaintiff out of his wheelchair." He alleges they both taunted
4 him by "telling him to get back into his wheelchair." (Ct. Rec. 1
5 at 3.) Plaintiff states he was placed in a holding cell and
6 "immediately told the police officers that he needed special
7 equipment for toileting and hygiene, but the officers told him
8 they did not care about his needs." (Id.) Plaintiff alleges he
9 was not placed in a handicap accessible jail cell and soiled
10 himself as a result of the officers' failure to accommodate his
11 special needs. (Ct. Rec. 1 at 3-4.)

12 The City counters because plaintiff was booked and supervised
13 "only by jail personnel," the City has no liability with respect
14 to Mr. Foley's four⁵ jail accommodation claims (lack of access to
15 adequate bedding, medication, toilet facilities and medical
16 toileting equipment). Second, the City argues Title II of the ADA
17 does not apply to arrest. Accordingly, the City argues, plaintiff
18 fails to establish the City's liability for his ADA claim. (Ct.
19 Rec. 39 at 7.)

20 The relevant portion of Title II states:

21 "no individual with a disability shall, by reason of such
22 disability, be excluded from participation in or be denied the
23 benefits of the services, programs, or activities of a public

24 ⁵Mr. Foley originally alleged defendants denied
25 him adequate access to a shower, because although he was
26 allowed to use a shower room, he was required to shower seated
27 in his wheelchair due to the lack of handrails. (Ct. Rec.
28 1 at 4.) At oral argument defendant County pointed out
out plaintiff was able to shower. Mr. Foley admitted in
his deposition he used a special chair for showering. The
County's argument is, in essence, unrefuted.

1 entity, or be subject to discrimination by any such entity."

2 42 U.S.C. § 12132.

3 The City asserts it does not own, operate, supervise, staff,
4 or maintain the Klickitat County Jail, and had no role in Mr.
5 Foley's accommodations during incarceration. (Ct. Rec. 39 at 7.)
6 The City seeks dismissal of this claim contending plaintiff fails
7 to show any basis for the City's liability. (Id.)

8 To the extent plaintiff alleges the City violated his rights
9 protected by the ADA during his incarceration, the City is
10 correct. Plaintiff fails to establish a basis for the City's
11 liability as to his accommodation claims under the ADA.

12 The City argues, alternatively, its only contact with Mr.
13 Foley was his arrest and he does not challenge his arrest. Citing
14 *Hainze and Rosen*⁶, the City further argues Title II of the ADA
15 does not apply to arrests. (Ct. Rec. 39 at 8.) The Court agrees
16 categorizing a criminal suspect's arrest as a denial of the
17 benefit of "a service or activity" strains the language of the ADA
18 past its breaking point. See *Patrice v. Murphy*, 43 F.Supp.2d
19 1156, 1159-1160 (W.D. Wash. 1999), and *Rosen*, 121 F.3d at 157. An
20 arrest is not the type of "service, program or activity"
21 contemplated by the ADA. Accordingly, the City's motion for
22 summary judgment (Ct. Rec. 38) as to plaintiff's ADA claim is
23 **GRANTED.**

24 The County asserts Mr. Foley fails to establish a
25 violation of his rights under the ADA. Specifically, the County
26 argues Mr. Foley fails to meet his burden of showing (1) he was

27 6

28 *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), and *Rosen v.*
Montgomery Co., Maryland, 121 F.3d 154 (4thth Cir. 1997).

1 excluded from or denied the benefit of any service provided by the
2 jail; (2) the jail received federal funding; and (3) there is
3 evidence of deliberate indifference and intentionally inflicted
4 damages. With respect to injunctive relief under the ADA, the
5 County is correct Mr. Foley's claim must be dismissed as moot
6 because he was released from jail. (Ct. Rec. 51 at 19); see e.g.,
7 *Johnson v. Moore*, 948 F.2d 517, 517 (9th Cir. 1991).

8 The first requirement is dispositive. The County is correct
9 that plaintiff fails to show he was denied hygiene services with
10 respect to showering and toilet access in the jail. The record
11 shows Mr. Foley admits he was allowed to use a handicap accessible
12 bathroom in the jail lobby. (Ct. Rec. 50 at ¶ 39, citing Foley
13 dep. at p.49, lines 4-9; 60 at 4.) He admits the jail gave him
14 the medical equipment he needed for toileting. (Ct. Rec. 50 at ¶
15 35, citing Foley dep. at p.158, lines 11-12.) Mr. Foley was given
16 a special chair for the toilet and shower; he admits using it
17 safely. (Ct. Rec. 50 at ¶ 36, citing Foley dep. at p.162, lines
18 14-24). He was given a catheter, urostomy bag and clean diaper
19 within 90 minutes of being placed in confinement. (Ct. Rec. 60 at
20 4-5.) Plaintiff admits he showered in the jail. (Ct. Rec. 50 at ¶
21 43, citing Foley dep. At p.167, lines 8-9.)

22 Mr. Foley admits receiving his medication in the jail. (Ct.
23 Rec. 50 at ¶ 28, citing Foley dep. at p.170, lines 10-15, p.173,
24 lines 11-12.) The record shows he was given two blankets. (Ct.
25 Rec. 54 at 35.)

26 Plaintiff fails to establish he was denied services provided
27 by the jail.

28 Although Mr. Foley establishes the ADA's first requirement,

1 that he is an individual with a disability, he fails to establish
2 he was excluded from participation in or denial of the benefits of
3 services, or that he was otherwise discriminated against solely
4 based on his disability.

5 On this record, no violation of plaintiff's rights under the
6 ADA is established. The County's motion for summary judgment with
7 respect to plaintiff's ADA claim (Ct. Rec. 49) is therefore

8 **GRANTED.**

9 B. Rehabilitation Act of 1973

10 Plaintiff asserts defendants violated his rights protected by
11 29 U.S.C. ¶ 794, the Rehabilitation Act of 1973 (RA), when he
12 suffered the same deprivations he alleges under the ADA. (Ct.
13 Rec. 1 at 5-6.) The Act provides, in pertinent part:

14 "No otherwise qualified individual with a disability . . .
15 shall, solely by reason of her or his disability, be excluded from
16 the participation in, be denied the benefits of, or be subjected
17 to discrimination under any program or activity receiving Federal
18 financial assistance . . . " In order to state a valid claim,
19 plaintiff must therefore show that: (1) he is an "otherwise
20 qualified individual with a disability"; (2) he was subjected to
21 discrimination; and (3) the entity that engaged in discrimination
22 received federal financial assistance. *See Duffy v. Riveland*, 98
23 F.3d 447 (9th Cir. 1996).

24 Defendant City asserts (and it is unrefuted) no federal
25 funding they receive was used to support any police department
26 operations related to Mr. Foley's arrest. (Ct. Rec. 40 at ¶ 66.)
27 The Ninth Circuit has opined it is unlikely the RA would apply
28 beyond the program actually receiving the federal assistance. *See*

1 *Herman v. United Bhd. Of Carpenters*, 60 F.3d 1375, 1382 at n. 3
2 (9th Cir. 1995). As the City's argument is unrefuted, they
3 demonstrate the absence of a genuine issue of material fact, and
4 are entitled to summary judgment as a matter of law with respect
5 to the RA claim. The City's motion for summary judgment on the RA
6 claim (Ct. Rec. 38) is **GRANTED**.

7 Defendant County argues, as they did with respect to the ADA
8 claim, plaintiff was not subjected to discrimination while
9 incarcerated because the accommodations offered were reasonable.
10 (Ct. Rec. 51 at 10-13) and, even if plaintiff shows
11 discrimination, he fails to meet even his minimal evidentiary
12 burden of showing any discrimination was solely because of his
13 disability. (Ct. Rec. 51 at 13-16, citing, in part, *Pfaff v.*
14 *Washington*, WL 5142805 *11-12 (W.D. Wash., 2008).

15 For the reasons stated in the preceding ADA section, Mr.
16 Foley's claim under the RA similarly fails. Plaintiff does not
17 establish the accommodations offered were in any way unreasonable.
18 See e.g., Ct. Rec. 51 at 15 (jailers who provided toileting
19 equipment did not witness any signs of soiling; plaintiff wore a
20 diaper when he was arrested). Plaintiff offers no evidence
21 refuting the County's assertion it received no federal funding, as
22 his burden under the RA (Ct. Rec. 51 at 16). See *Weinreich v.*
23 *Metropolitan Transp. Authority*, 114 F.3d 976,978 (9th Cir.
24 1997)(elements of an RA claim). And, for purposes of recovering
25 monetary damages, plaintiff fails to show deliberate indifference.
26 *Duvall v. Kitsap County*, 260 F.3d 1124, 1138 (9th Cir. 2001). The
27 County demonstrates the absence of a genuine issue of material
28 fact, and that they are entitled to summary judgment as a matter

1 of law. Accordingly, defendant County's motion for summary
2 judgment (Ct. Rec. 49) is **GRANTED** as to plaintiff's RA claim.

3 C. Washington's Law Against Discrimination

4 Plaintiff alleges he suffered discriminatory treatment in
5 violation of RCW 49.60.030 and RCW 49.60.215 (WLAD) (Ct. Rec. 1 at
6 6-7).

7 The City argues an arrest is not a service protected by the
8 WLAD (Ct. Rec. 39 at 19, citing *Fell v. Spokane Transit Authority*,
9 911 P.2d 1319,1329 (Wash. 1996).

10 R.C.W. 49.60.030, "Freedom from Discrimination - Declaration
11 of civil rights," states: "The right to be free from
12 discrimination because of race, creed, color, national origin,
13 sex, or the presence of any sensory, mental, or physical
14 disability . . . is recognized as and declared to be a civil
15 right." R.C.W. 46.60.030(1993).

16 R.C.W." 49.60.215, "Unfair practices of places of public
17 resort, accommodation, assemblage, amusement", states:

18 "It shall be an unfair practice for any person or the
19 person's agent or employee to commit an act which directly or
20 indirectly results in any distinction, restriction, or
21 discrimination . . . or the refusing or withholding from any
22 person the admission, patronage, custom, presence, frequenting,
23 dwelling, staying or lodging in any place of public resort,
24 accommodation, assemblage, or amusement, except for conditions and
25 limitations established by law and applicable to all person,
26 regardless of race, creed, color, national origin, sex, the
27 presence of any sensory, mental, or physical disability
28 . . ."

1 R.C.W. 49.60.215 (1993).

2 To establish a prima facie case, plaintiff must establish
3 four elements: (1) a disability; (2) defendant's establishment is
4 a place of public accommodation; (3) defendant discriminated
5 against plaintiff by providing treatment that was not comparable
6 to that provided to the non-disabled; and (4) the disability was a
7 substantial factor in causing the discrimination. *Negron v.*
8 *Snoqualmie Valley Hosp.*, 86 Wn. App. 579, 581 (1997) (as amended).

9 Plaintiff offers no basis for this Court to conclude a county
10 jail is a place of public accommodation under the WLAD. The record
11 shows See Ct. Rec. 53 at 11: "the Klickitat County Jail is not a
12 place of public accommodation under Washington law" (Ct. Rec. 40
13 at ¶ 68); the state Human Rights Commission denied Mr. Foley's
14 charge against Klickitat County for lack of jurisdiction, because
15 the jail "is not a place of public accommodation under Washington
16 law." (Ct. Rec. 41 at ¶ 7.) To date, *Pennsylvania Department of*
17 *Corrections v. Yeskey*, 524 U.S. 206, 209 (1998), does not extent
18 to county jails.

19 Based on the material facts in the record, plaintiff is not
20 able to establish any of his three claims. It is therefore
21 ordered that defendants' motions for summary judgment be granted
22 and that judgment be entered, as a matter of law, in favor of
23 defendants and against plaintiff on plaintiff's claims of
24 violations of his rights pursuant to federal and state law.

25 V. Conclusion

26 For the reasons discussed above, defendants' motions for
27 summary judgment (Ct. Recs. 38, 49) are **GRANTED**. Plaintiff's
28 complaint is dismissed with prejudice.

IT IS ORDERED:

1. Defendants' motions for summary judgment (**Ct. Recs. 38, 49**) are **GRANTED**.

2. Plaintiff's complaint is dismissed with prejudice.

3. The status hearing on January 21, 2010 at 10 a.m. (Ct. Rec. 47) is **STRICKEN AS MOOT**.

The District Court Executive is directed to enter this Order, forward copies to the parties, and CLOSE the file.

DATED this 30th day of December, 2009.

S/James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE